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Achieving Justice in Personal Injury Compensation: The Need to Address the Emotional Dimensions of Suffering a Wrong†

Arno Akkermans*

Research shows that perceived injustice is an important predictor of worse health and rehabilitation outcomes after injury. Fault-based injury compensation schemes are considered to be generally more anti-therapeutic than no-fault schemes. This chapter starts from the submission that the fault or no-fault basis of schemes is not necessarily decisive for the level of adversarialism of claims handling procedure, and that a more detailed knowledge is required of the mechanisms that lie behind the negative correlation of adversarialism with recovery and health outcomes. It recounts some findings in empirical studies on reconciliation and the elements and effects of apologies, to extrapolate these to the process of the resolution of injury claims. The emotional and moral impact of suffering harm as a result of a committed wrong as identified in these studies, is compared to the properties of the process of the out of court resolution of injury claims. After it is concluded that these properties generally do not address this impact but instead often increase it, several options are identified to tackle these anti-therapeutic effects. These options involve several aspects of the process of the resolution of injury claims, such as taking responsibility by taking and keeping the initiative, providing recovery-focused services, promoting personal contact between the person responsible for the harm-causing event and the victim, promoting participation of the victim in the resolution process, having assessments carried out by neutral third parties, and more in general promoting the experience of procedural justice.

† I am deeply indebted to Liesbeth Hulst, and must also acknowledge the contribution of Susanne van Buschbach, as this chapter consists to a considerable extent of further thoughts on earlier collaborative research, published in AJ Akkermans and JE Hulst, 'De niet-financiële impact van schadetoebrenging en hoe daaraan tegemoet te komen' (2014) *Tijdschrift voor Vergoeding Personenschade* 102 ([ResearchGate](#)), and JE Hulst et al, *Excuses aan verkeersslachtoffers. Een onderzoek naar baten, effectiviteit en methode van het bevorderen door verzekeraars van het aanbieden van excuses aan verkeersslachtoffers* (Den Haag, Boom Lemma uitgevers, 2014) ([ResearchGate](#)). I also wish to acknowledge the support of Alfred Allan, professor of psychology at Edith Cowan University in Perth (WA), who reassured me of my fears of being on thin ice here and there in my extrapolation of the outcomes of psychological research.

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I. Introduction

A growing body of evidence of the impact of justice-related appraisals on recovery trajectories following injury, shows that perceived injustice is a powerful predictor of worse outcomes.¹ It seems to be increasingly likely that perceived injustice is an appraisal process that is central to physical and psychological outcomes in the context of rehabilitation after injury.² Perceived injustice is of course also undesirable in itself. It has been suggested that fault-based injury compensation schemes are generally more burdensome and anti-therapeutic for the individuals that have to resort to them than are no-fault schemes.³ This is generally attributed to the fact that fault-based schemes involve more adversarial interactions, as claimants have to prove liability, causality and financial consequences. I have no reason to question these assumptions,⁴ but I think that in order to contribute to the improvement of compensation systems a more detailed understanding is required of the experiences of injured claimants and of the mechanisms that can make those experiences so negative.⁵ This involves going beyond the fault/no-fault divide.

¹ MJL Sullivan et al, 'Perceived Injustice and Adverse Recovery Outcomes' (2014) 4 *Psychological Injury and Law* 325 ([ResearchGate](#)); C Orchard et al, 'How Does Perceived Fairness in the Workers' Compensation Claims Process Affect Mental Health Following a Workplace Injury?' (2019) *Journal of Occupational Rehabilitation* 1 (€); NA Elbers et al, 'Differences in Perceived Fairness and Health Outcomes in Two Injury Compensation Systems: A Comparative Study' (2016) 16 *BMC Public Health* 658 ([ResearchGate](#)); NA Elbers et al, 'Procedural Justice and Quality of Life in Compensation Processes' (2013) *Injury* 1431 ([SSRN](#), [ResearchGate](#)); A Collie et al, 'Injured Worker Experiences of Insurance Claim Processes and Return to Work: A National, Cross-sectional Study' (2019) 19 *BMJ Public Health* 927; E Yakobov et al, 'The Role of Perceived Injustice in the Prediction of Pain and Function after Total Knee Arthroplasty' (2014) 155 *Pain* 2040 ([CiteSeer](#)); MJ Sullivan et al, 'Pain, Perceived Injustice and the Persistence of Post-traumatic Stress Symptoms during the Course of Rehabilitation for Whiplash Injuries' (2009) 145 *Pain* 325 ([Sullivan](#)); MJ Sullivan et al, 'Perceived Injustice: A Risk Factor for Problematic Pain Outcomes' (2012) 28 *The Clinical Journal of Pain* 484 ([Sullivan](#)); MJ Sullivan et al, 'Perceived Injustice is Associated with Heightened Pain Behavior and Disability in Individuals with Whiplash Injuries' (2009) 2 *Psychological Injury and Law* 238 ([ResearchGate](#)); KR Monden et al, 'The Unfairness of it All: Exploring the Role of Injustice Appraisals in Rehabilitation Outcomes' (2016) 61:1 *Rehabilitation Psychology* 44 ([ResearchGate](#)).

² Monden et al, above, n 1.

³ Elbers et al (2016), above, n 1; K Lippel, 'Therapeutic and Anti-therapeutic Consequences of Workers' Compensation Systems' (1999) 22 *International Journal of Law and Psychiatry* 521 ([ResearchGate](#)).

⁴ Which is not to say that these assumptions are generally accepted. Shuman has pointed out that in theory, the adversarial system has the potential to perform better in promoting procedural justice than first-party insurance and no-fault systems. See EW Shuman, 'The Psychology of Compensation in Tort Law' (1994) 43 *Kansas Law Review* 39. He also notes that 'How well the process in fact fulfills that idealized goal in each case may be a matter of some dispute' (ibid, p 64). Indeed. It seems to me that in the reality of everyday life, the adversarial process more often than not completely fails to fulfil that idealised goal. Yet Shuman's interesting observations certainly deserve more consideration than space permits me to give here.

⁵ See eg E Kilgour et al, 'Interactions between Injured Workers and Insurers in Workers' Compensation Systems: A Systematic Review of Qualitative Research Literature' (2014) 25:1 *Journal of Occupational Rehabilitation* 160 ([ResearchGate](#)).

Whether a system is fault-based or not is, strictly speaking, only a difference in the legal basis of the substantive rights of claimants to compensation – the payment trigger, so to speak. The extent to which this is necessarily also decisive in terms of the kind of procedure by which claims are handled is an interesting question. I would like to submit that it is not. It is only tradition that might make us suppose otherwise. There are plenty of claims and entitlements that are not based on anyone's fault which are resolved in a most adversarial way. One only has to think of private disability insurance, but of course there are many other examples.⁶ And conversely, it seems perfectly possible – at least in theory – to resolve a fault-based claim in a non-adversarial manner, while fully honouring all the requirements intrinsic to fault-based compensation, such as the establishment of fault, causality and damage. For example, an interesting – although probably too feeble – legislative effort to this effect has recently been made in the Netherlands with regard to the resolution of medical malpractice claims.⁷ That, for instance, fault has to be established, does not necessarily imply that the relevant facts have to be established on the basis of a process of submission and refutation in which both the initiative and the burden of proof lie with the plaintiff, whose claim will be rejected if he does not present sufficient facts to support it or fails to present sufficient proof. It is perfectly possible for an insurer or an agency actively to investigate all aspects relevant to the claim, take the initiative in the discovery of facts, and to complement or even correct in good faith the presentations made by the claimant. I must add, however, that I think that in any system, fault or no-fault, it can be problematic to establish that the claimant is continuing to experience significant disability.

Once one is willing to open up to the possibility that there is nothing inevitable in the way claims are to be handled, either in a fault-based or in a no-fault system, many questions come to the fore. If non-adversarial procedures produce better outcomes in terms of perceived justice, recovery and health, why do we have adversarial ones at all? What particulars determine the level of adversarialism of a procedure, and what mechanisms lie behind the negative correlation with recovery and health outcomes? What does it take to change claims handling procedure for the better?

⁶ Another example is workers' compensation. According to Lippel et al is the promise of no-fault workers' compensation systems for non-adversarial relations between workers, employers and the systems themselves in many cases 'a chimera'. See K Lippel et al, 'Workers' Compensation in Canada: Experiences of Precariously Employed Workers in the Return to Work Process after Injury', Chapter 5 of this book. See also K Lippel, 'Preserving Workers' Dignity in Workers' Compensation Systems: An International Perspective' (2012) 55:6 *American Journal of Industrial Medicine* 519 ([ResearchGate](#)); Kilgour et al, above, n 5.

⁷ BL Laarman and AJ Akkermans, *Compensation Schemes for Damage Caused by Healthcare and Alternatives to Court Proceedings in the Netherlands. The Netherlands National Reports to the 20th General Congress of the International Academy of Comparative Law, Fukuoka, Japan, 22–28 July 2018* (Netherlands Reports to the Twentieth International Congress of Comparative Law, 2018), ([SSRN](#), [ResearchGate](#)).

I can, of course, not even begin to discuss all these questions in this chapter, but there is one particular issue that I would like to elaborate on here, and that is the emotional and moral impact of suffering harm as a result of a wrong being committed, the possible ways to address this, as identified in empirical studies on reconciliation and apologies, and what these insights could possibly tell us about the process of the resolution of injury claims. As this brings together apology research and research on compensation and health, I think it is an appropriate perspective for this book.

II. The Impact of Suffering Harm as a Result of a Wrong Being Committed

It should be noted that not all injury claims result from being subjected to a wrong, as in no-fault contexts one can also be eligible for compensation when no other party was involved in the incident that caused the injury, and it might even be that the injured person blames himself severely for occasioning his injury and the ensuing predicament of his loved ones. Nonetheless, also in a no-fault system, many claims will originate in an incident for which someone else is to blame,⁸ and my estimate would be that they generally constitute the vast majority.

It is a constant outcome of research into the motives and experiences of injured persons pursuing a claim for damages, that financial compensation is often not reported as their sole or even primary motive. Research has revealed a variety of non-financial needs and motives, such as for clarification of what has happened, acknowledgement of fault, the taking of responsibility for the incident and its consequences, the offering of apologies, seeing justice done, and preventing the same incident from occurring again.⁹ Depending on the circumstances, these

⁸ See LJ Ioannou et al, 'Traumatic Injury and Perceived Injustice: Fault Attributions Matter in a "No-fault" Compensation State' (2017) 12:6 *PLoS ONE*; NA Elbers et al, 'Does Blame Impede Health Recovery after Transport Accidents?' (2015) 8(1) *Psychological Injury and Law* 82.

⁹ T Relis, 'It's Not about the Money, A Theory on Misconception of Plaintiffs' Litigation Aims' (2017) *Pittsburgh Law Review* 1 ([ResearchGate](#)); AJ Akkermans, 'Reforming Personal Injury Claims Settlement: Paying More Attention to Emotional Dimension Promotes Victim Recovery' (2009) *Torts & Products Liability eJournal*, ([SSRN](#), [ResearchGate](#)); C Vincent et al, 'Why Do People Sue Doctors? A Study of Patients and Relatives Taking Legal Action' (1994) 343:8913 *Lancet* 1609 (€); T Relis, *Perceptions in Litigation and Mediation. Lawyers, Defendants, Plaintiffs, and Gendered Parties* (Cambridge, Cambridge University Press, 2009) ([SSRN](#)); JK Robbenolt and VP Hans, *The Psychology of Tort Law* (New York, New York University Press, 2016) 17 ff; AJ Akkermans and KAPC van Wees, 'Het letselschadeproces in therapeutisch perspectief: hoe door verwaarlozing van zijn emotionele dimensie het afwikkelingsproces van letselschade tekortschiet in het nastreven van de eigen doeleinden' (2007) *Tijdschrift voor Vergoeding Personenschade* 103 ([ResearchGate](#)); JL Smeehuijzen et al, *Opvang en schadeafwikkeling bij onbedoelde gevolgen van medisch handelen* (Amsterdam, Vrije Universiteit Amsterdam, 2013) ([ResearchGate](#)); SD Lindenberg and AJ Akkermans (eds), *Ervaringen met verhaal van schade. Van patiënten, verkeersslachtoffers, geweldsslachtoffers, burgers en werknemers* (Civilologie / Civilology, 7). (Den Haag, Boom Juridische uitgevers, 2014) ([ResearchGate](#), [Core](#)).

aspirations need not be less significant than the objective of receiving a fair and honest compensation. In the Netherlands, this is sometimes summarised by the metaphor that an injured person is also ‘overdrawn on his emotional bank account’.¹⁰ The suggestion made here is that compensation is required not only on the monetary level but also on the emotional one.

It is stating the obvious to say that suffering injury from an accident can have a serious psychological impact. No research seems needed to establish that. But if one asks oneself how to best understand these psychological consequences and how they could be addressed, there is quite some empirical psychological research on the impact of suffering a wrong and the effects of apologies that could be useful. I do not present anything of a proper review of this research here,¹¹ but in a collaborative study I conducted with a research psychologist some time ago,¹² we concisely summarised existing theoretical perspectives on the psychological consequences of suffering a wrong roughly as follows.

A. Relational: Restoration of Status

First, psychological research suggests that a harm-causing event disturbs the balance between victim and perpetrator, which is accompanied by moral and emotional discomfort for both parties. An important notion is that a victim feels affected in his ‘status’ by a damage-causing event.¹³ This status is also described as social power or relative value of the victim in relation to the perpetrator. A harm-causing event affects victims in their perception of being an autonomous, respected, significant social player who is treated fairly and whose rights and identity are respected. Victims feel inferior regarding their power, honour, self-esteem, and perceived control, and may experience feelings of victimisation or anger.

¹⁰ This metaphor, widely used in a variety of contexts, derives from the concept of ‘emotional bank account’ coined by the American author Stephen Covey, see www.stephencovey.com.

¹¹ Overviews are offered by: D Slocum et al, ‘An Emerging Theory of Apology’ (2011) 63:2 *Australian Journal of Psychology* 832 ([ECU](#)); A Allan and R Carroll, ‘Apologies in a Legal Setting: Insights from Research into Injured Parties’ Experiences of Apologies after an Adverse Event’ (2016) 1 *Psychiatry, Psychology and Law* 10 ([ResearchGate](#)); A Allan et al, ‘Interpersonal Apologies: A Psychological Perspective of Why They Might Work in Law’ (2017) 7:3 *Oñati Socio-Legal Series* 390 ([SSRN](#)).

¹² AJ Akkermans and JE Hulst, ‘De niet-financiële impact van schadetoebrenging en hoe daaraan tegemoet te komen’ (2014) *Tijdschrift voor Vergoeding Personenschade* 102 ([ResearchGate](#)), and JE Hulst et al, *Excuses aan verkeersslachtoffers. Een onderzoek naar baten, effectiviteit en methode van het bevorderen door verzekeraars van het aanbieden van excuses aan verkeersslachtoffers* (Den Haag, Boom Lemma uitgevers, 2014) ([ResearchGate](#)).

¹³ N Shnabel and A Nadler, ‘A Needs-based Model of Reconciliation: Satisfying the Differential Emotional Needs of Victim and Perpetrator as a Key to Promoting Reconciliation’ (2008) *Journal of Personality and Social Psychology* 116 ([ResearchGate](#)). Shnabel and Nadler use the terminology of resources theory, which classifies the resources that are exchanged in social interactions into six categories (love, status, services, goods, information and money) and suggest that the resource that is threatened in victims falls into the category of status (ie the need for relative power).

According to the needs-based model of reconciliation of Shnabel and Nadler, victims must restore their sense of status and power.¹⁴ Shnabel and Nadler submit that victims want perpetrators to acknowledge their responsibility for the injustice that they have caused, and thus meet the victims' need to have their status restored. Perpetrators, too, experience psychological discomfort for having caused harm to someone. They suffer from moral inferiority and may feel guilt, shame or repentance. Being a perpetrator threatens one's image as moral and socially acceptable. Perpetrators want to restore their moral image and would actually hope for a friendly gesture from the victim. One major way the emotional needs of both parties can be met is through the offering and accepting of apologies. I will return to the healing power of apologies later.

B. Moral: Confirmation of the Violated Norm

A second implication of suffering a wrong presented in psychological studies is that victims would need (re)confirmation of the values that underlie the violated norm. This may sound somewhat abstract, but in fact is easy to imagine: anyone who apologises for his behaviour confirms that what he did was wrong; anyone who does not apologise could be perceived as not recognising that it was wrong. The most immediate satisfaction of this need might be the confirmation of the violated norm by the perpetrator himself, but confirmation from elsewhere can also be effective. This second implication of suffering a wrong seems to be in line with the first, as confirmation of the violated norm will generally contribute to the restoration of the victim's status.

C. An Example to Illustrate these Effects

A simple example may illustrate these effects. Imagine that in the hall of a railway station you are knocked over by someone running to catch his train. You hurt yourself, damage your clothes, and for a moment you lie on the floor in the sight of all onlookers before you manage to get up. Now imagine two scenarios for the events which follow: (1) the person who knocked you over continues running without any signs of caring about anything; (2) the person who knocked you over halts immediately, turns around, acts as embarrassed as you are, assists you in getting up, apologises, inquires whether you are hurt, and offers to reimburse costs in case of any damage to your clothes. It seems quite clear that scenario 1 will be much more offensive to you – even humiliating – than scenario 2. This may illustrate both the element of loss of status, and the suitability of apology to restore that status. In scenario 1 an element of 'denial' of the violated norm is also clearly recognisable: a person who just continues running seems to suggest that there is

¹⁴ Shnabel and Nadler, above, n 13.

nothing abnormal about what happened. In scenario 2 the element of the confirmation of the violated norm is equally perceptible: a person who responds in that way clearly acknowledges that what occurred is something that was not supposed to happen.

III. Apologies

A. The Healing Power of Apology

It seems rather obvious that apologies can make a lot of difference. This is sometimes summarised by speaking of ‘the healing power of apology’.¹⁵ This chapter is not the place for an extensive discussion of the research literature on the healing effects of apology and forgiveness. Apologies express responsibility, as well as confirmation of the violated norm, and thus meet the psychological needs of victims mentioned above.¹⁶ A principal result is the increased willingness to reconcile. Research literature offers many empirical indications for the assumption that in the case of personal injury also, apologies will have positive effects. Apologies can reduce negative emotions and perceptions of the injured party about the event that caused his injury and the responsible person, and create more room for a constructive, conciliatory attitude. Reducing negative emotions and attitudes will also mean that injured persons will be less inclined to seek justice through litigation.¹⁷ In particular, Jennifer Robbennolt’s empirical studies offer clear indications that apologies contribute to a more constructive attitude of injured parties with regard to claims settlement and to a smoother claims resolution process.¹⁸ There are also ample indications that by diminishing the experience of injustice, apologies will promote recovery.¹⁹

B. The Content of Apologies

Research literature indicates that there is no formula for a ‘perfect’ apology. An apology is effective when it is considered ‘good enough’ by the injured party.

¹⁵ Eg A Lazare, *On Apology* (Oxford, Oxford University Press, 2004).

¹⁶ This is an enormous simplification. For a comprehensive overview see Allan et al, above, n 11.

¹⁷ P Vines, ‘Apologising for Personal Injury in Law: Failing to Take Account of Lessons from Psychology in Blameworthiness and Propensity to Sue’ (2015) 4 *Psychiatry, Psychology and Law* 624 ([Academia](#)).

¹⁸ JK Robbennolt, ‘Apologies and Legal Settlement’ (2003) 102 *Michigan Law Review* 460 ([UMich](#)); JK Robbennolt, ‘Apologies and Settlement Levers’ (2006) 3 *Journal of Empirical Legal Studies* 333 ([€](#)); JK Robbennolt, ‘Apologies and Medical Error’ (2009) 467 *Clinical Orthopaedics and Related Research* 376 ([PMC](#)).

¹⁹ MJL Sullivan et al, ‘Perceived Injustice and Adverse Recovery Outcomes’ (2014) 4 *Psychological Injury and Law* 325 ([ResearchGate](#)).

Whether this is the case depends on several aspects identified in the literature, such as the sincerity, the content, and the focus of the apology, and multiple variables relating to the parties involved and the circumstances in which the apology takes place.²⁰ As for the content of apologies, researchers have differed considerably as to the specific number and names of its components. A concise classification distinguishes between three elements, which can be summarised as affirmation, affect and action: ²¹

1. affirmation: recognising responsibility for the transgression and its consequences;
2. affect: expressions of remorse and sympathy for the injured party;
3. action: to actually take remedial measures.

The most powerful is a ‘full’ apology containing all three elements but each of them separately has an autonomous effect. The first element seems to be the most important, and all three elements reinforce each other. Recognising responsibility is more effective than merely showing sympathy. Apologies that acknowledged responsibility led to less negative and more positive perceptions and emotions about the perpetrator and the incident than when only sympathy was expressed. Only an expression of sympathy was generally better than no apology at all. It seems, however, quite possible that, when sympathy is expressed but the wrongfulness of the behaviour is not acknowledged, injured parties might for example consider recurrence of the transgression more likely. Taking remedial measures (in our context: the offering of compensation) reinforces the other elements by adding to their credibility. Victims form impressions of the character and sincerity of the perpetrator on the basis of both his actions and his statements. A perpetrator who takes remedial measures seems to be accepting responsibility and/or feel remorse and sympathy not only in words but also in deeds. In our context, apologies will have to be offered in addition to – and not instead of – compensation. The offering of only compensation or only apologies was found to be less effective than the combination of the two.²²

IV. Procedural Justice

There is one particular element of perceived justice that has been researched extensively over recent decades, and that is procedural justice. Procedural justice literature shows that people form a subjective opinion about the justice and fairness of procedures and rules (in our case: of claims resolution) and are particularly

²⁰ Allan and Carroll, above, n 11.

²¹ Slocum et al, above, n 11; Allan and Carroll, above, n 11.

²² TG Okimoto and TR Tyler, ‘Is Compensation Enough? Relational Concerns in Responding to Unintended Inequity’ (2007) 10:3 *Group Processes & Intergroup Relations* 399 ([HAL](#)).

sensitive to whether they are treated in an honest, respectful manner (in our case: primarily by the agency or insurer).²³ The key constructs that are considered to be decisive for the experience of procedural justice are: voice, trustworthy motives, dignity and respect, and neutrality in decision making. An abundance of evidence demonstrates that the subjective judgment people make about proceedings being fair and just has significant effects on their subsequent behaviour and attitudes towards the decision and the authority that took it (the so-called ‘fair process effect’).²⁴ In the resolution of injury claims as well, the positive effect that people’s fairness perceptions have on their subsequent reactions will be greater the more they experience the process as fair and just. As mentioned above, a growing body of evidence shows that perceived (in)justice is a powerful predictor of health and rehabilitation outcomes after injury.²⁵ The effect of perceived procedural justice on the responses of injured persons might be all the more considerable in lump-sum systems, as the outcome only comes at the end and is difficult to judge on its merits. In any system it seems plausible that injured persons will be extra-susceptible to perceived procedural justice, as research literature shows that people are extra-sensitive to procedural justice under ‘alarming circumstances’ and when they are in a state of personal uncertainty.

V. Some Characteristics of Claims Resolution in the Light of the Emotional Dimensions of Suffering a Wrong

If one considers the conventional process of resolution of injury claims in the light of the psychological consequences of suffering a wrong and the ensuing emotional needs of victims outlined above, it seems clear that certain characteristics of this process are likely to frustrate satisfaction of those needs, and may even increase them.

A. The Initiative Lies with the Victim

In any compensation system, be it fault or no-fault based, it will be up to the injured party to take the initiative to file his claim. It is more typical for fault-based than

²³ JW Thibaut and LJ Walker, *Procedural Justice: A Psychological Analysis* (New York, Wiley, 1975); TR Tyler, *Why People Obey the Law* (New Haven, CT, Yale University Press, 1990).

²⁴ K van den Bos, ‘What is Responsible for the Fair Process Effect?’ in J Greenberg and JA Colquitt (eds), *Handbook of Organizational Justice: Fundamental Questions about Fairness in the Workplace* (Mahwah, NJ, Lawrence Erlbaum, 2005) ([UU](#)); K van den Bos et al, ‘On the Role of Perceived Procedural Justice in Citizens’ Reactions to Government Decisions and the Handling of Conflicts’ (2014) 4 *Utrecht Law Review* 1.

²⁵ See references above, n 1.

for no-fault systems that information relevant to the claim has to be brought forward by the plaintiff, yet both systems may vary in the extent to which the agency or insurer actively makes inquiries. In both types of system, claimants will experience a substantial power imbalance between themselves and the agency or insurer, and may experience suspicion due to the agency/insurer's responsibility to identify and reject spurious claims. The agency or insurer will have more bargaining power in negotiating settlement offers, and issues that are in dispute will often be decided on the basis of a process in which the initiative and the burden of proof lie with the claimant. All these features will presumably evoke the impression among victims that they themselves are the 'owners' of the problem that damage has been inflicted upon them, which now has to be limited and assessed, and for which they have to seek compensation. To the victim, the agency or insurer may seem to be dragging their feet or passive, the resolution process may appear to be slow, laborious, and taking too long. Since, from the victim's perspective, the responsibility for acknowledging wrongdoing and for rectifying its consequences lies with the perpetrator, the merely reactive or even passive behaviour of his agents (agency or insurer) will be experienced as morally inappropriate and cause further grievance. This will contribute to the victim experiencing injustice and thereby hamper recovery.

B. The Responsible Party Disappears out of Sight

Second, depending on the context of the case, there may be no, or only a limited amount of, personal contact between the victim and the person responsible for the incident. In case of traffic accidents, the responsible party often disappears out of sight right after the accident and the victim is referred to the insurer or the compensation agency. In case of adverse medical events, the extent to which the patient initially has personal contact with the doctor or other healthcare professional may vary, but for the resolution of financial issues the patient will invariably be referred to others. Victims who have sought representation often no longer participate in person in interactions with the other party. The perpetrator does not personally compensate the victim for his damage and costs, and will usually no longer have any personal contact with him. From the perspective of victims, the perpetrator is not taking responsibility for having caused the damage: either in words or in deeds. The perpetrator is often not even aware of the consequences for the victim and does not undertake to be informed about them.

C. No Symbolic Confirmation of the Violated Norm

Third, the vast majority of personal injury claims are resolved out of court. Fortunate as that may be for a variety of reasons, it implies that there will not be an authoritative proclamation that a norm was violated and that the incident and the ensuing damage are the responsibility of the transgressor. Practices will no doubt

vary, but it seems safe to assume that when at a certain point in time an insurer or agency accepts liability, this step will normally be merely a matter of routine, just one of the boxes to be ticked – albeit an important one – and will not involve any explicit or implicit recognition of the legitimacy of the violated norm. It seems plausible that merely ticking the box of liability will neither serve to confirm the violated norm, nor to restore the status of victim.

D. ‘Taboo Trade-off’

Finally, the following mechanism may also be at play. The resolution of personal injury claims is almost exclusively focused on assigning monetary value to the victim’s losses. Research shows that people regard money and impairment of health as qualitatively very different entities, which are not interchangeable. There is empirical evidence that the comparing of non-interchangeable quantities such as money and impairment is perceived as morally inappropriate and produces emotional and cognitive discomfort: especially anger and negative appraisals of persons who make such ‘inappropriate’ comparisons. This is referred to as an ‘taboo trade-off’.²⁶ Lawyers, insurers and other professionals involved in claims resolution are of course quite aware that money cannot really make up for physical or psychological injury, but reason that monetary compensation is the only remedy available. In the research literature it is, however, assumed that the psychological discomfort about this inappropriate comparison will diminish if the violated norm is symbolically confirmed.²⁷

E. An Example to Illustrate These Aspects

Some of these aspects may be illustrated by an example. Imagine that you take your car to work every day, backing out from your carport to the street. On a bad day, when you return from work, your partner explains that you hit a child that morning without noticing, and that it lives a few blocks away in your neighbourhood. There was some crying and possibly some blood, but it is unclear how serious the consequences are, because the child was immediately taken home. What would be your immediate reaction – as a morally sound person? What would you do at that moment? I will tell you what you would do. You would *go* there. You would not send a letter or write an email. You might try to call them first but you would want go there in person. The normal reaction would be to immediately get in touch with the family to inquire about the child’s condition, to explain that you did not see it

²⁶ AP Fiske and PE Tetlock, ‘Taboo Trade-offs. Reactions to Transactions that Transgress the Spheres of Justice’ (1997) 44 *Political Psychology* 255 ([UCLA](#)); PE Tetlock et al, ‘The Psychology of the Unthinkable: Taboo Trade-offs, Forbidden Base Rates, and Heretical Counterfactuals’ (2000) 78 *Journal of Personality and Social Psychology* 853 ([ResearchGate](#)).

²⁷ Tetlock et al, above, n 26.

and really didn't notice the incident, to apologise, to offer compensation of any damage, and so on. You would take responsibility and you would do it in person. It is a morally 'normal' reaction like this that injured victims and their families consciously or unconsciously expect from any fellow member of society.

The aftermath of most injury-causing events is often very different. Those involved in a traffic accident, for instance, often do not know what the consequences are for the other party, do not always have personal contact, and after the initial shock there is only contact with the insurer or agency. And for that insurer or agency, however empathic they may be, a victim is simply the umpteenth file. They may communicate as professionally as can be (or not), but they were not personally involved in the incident. In this light, it is not surprising that the usual course of events does not fit well with the moral experiences of personal injury victims, and can be experienced as a denial of responsibility, even if the insurer or agency actually takes steps to compensate the financial damage. Many professionals working in compensation systems will have experienced the fact that, even years after the event, victims can still be upset about the fact that they never heard from the person responsible for the incident that caused their injury.

F. Why Secondary Victimisation Looms so Close

In view of the characteristics of the claims resolution process described above, it seems clear that this process generally will not contain sufficient elements that can accommodate victims' emotional needs, but will instead often increase their aggravation. Usually, neither the element of restoration of status, nor that of confirmation of the violated norm, will be met. These characteristics can greatly contribute to the experience of injustice. Victims who enter into the resolution process with an 'overdrawn emotional bank account' resulting from the original injury causing event, will not experience emotional compensation but will see their emotional deficit increased. The suffering of the original injury can easily be followed by additional moral and emotional affront. If relations are further stressed by a demanding – let alone a downright adversarial – resolution process, it is quite conceivable that the originally felt lack of recognition can become the starting point of a chain of interactions in which negative stereotypes are further confirmed. The insurer or agency can thus easily become 'the enemy'. The consequences of this are severe. You are injured at the fault of another. You are not at your best. To try to get what is due to you, you have to face an opponent much more experienced and powerful than you. The triumph of injustice. Bad outcomes all round.

VI. Making Claims Resolution Processes More Emotionally Intelligent

As submitted above, and as will be further illustrated below, the payment trigger of a compensation system – fault or no-fault – need not be decisive for the level of adversarialism of its claims resolution process. It should be added that neither is this the case for the moral and emotional experiences which personal injury victims are likely to gain when navigating the system. There are of course many different perspectives from which one could deliberate on better claims resolution processes.²⁸ Thompson, Elbers and Cameron have recently done so from a health system perspective, and I will come to one of their important considerations later.²⁹ In line with the argumentation developed above, I will discuss more optimal claims resolution processes from the perspective of the psychological consequences of suffering a wrong and the ensuing emotional needs of personal injury victims. How can the claims resolution processes be made more emotionally intelligent? However, I cannot pretend that the analysis outlined above will be my sole inspiration. Inevitably, considerations also come into play that are more or less generally known in the field of injury and compensation – many of them are discussed in other chapters of this volume – which I was not in a position to introduce explicitly above. The psychological consequences of suffering a wrong and the ensuing emotional needs of victims will nonetheless remain my main point of reference.

A. The Antidote to Adversarialism: Proactive Claims Resolution

If one is truly prepared to accept the moral inappropriateness of such a generally accepted and uncontested element of compensation procedure as the initiative being placed – and in many respects remaining – on the injured party, a new light is shed on a multitude of elements of claims resolution and the aftermath of accidents. The first thing that comes to mind is proactive claims resolution, already often advocated for expeditiousness and other virtues, but actually also indispensable to address the needs for justice of personal injury victims.

From the victim's perspective, the responsibility for acknowledging the wrongdoing and rectifying its consequences lies with the perpetrator. It seems plausible, therefore, that an explicitly active attitude on the part of his agents (insurer or agency) in claims settlement is essential to meet the victim's moral

²⁸ For instance from the perspective of the preservation of the dignity of claimants, see Lippel (2012), above, n 6.

²⁹ J Thompson et al, 'Optimising the Health of People in Road Injury Compensation Processes: What is the Role of Regulators and Insurers?' in A Craig and R Guest (eds), *Adversity after the Crash: The Physical, Psychological and Social Burden of Motor Vehicle Accidents* (New York, Nova Science, 2019) ([VU](#)).

expectations, and in particular to address the core need that responsibility be taken for unjustly causing damage. A merely reactive or wait-and-see attitude on the part of the insurer or agency, let alone a dismissive one, could easily appear inappropriate and might well be perceived as an implicit denial of responsibility. The injured party has been the victim of another person's fault and it simply does not feel fair to have to go for it himself. Why should the victim be responsible for solving a problem that someone else has created? The victim should not be placed or left in the position of being the 'owner' of the problem that damage has been inflicted upon him, which must now be identified, acted upon, limited, assessed, compensated and so on. The insurer or agency should deliberately position itself at least as the 'co-owner' of these problems and responsibilities, and express not only through its words, but also through its actions, that it (on behalf of the perpetrator) takes responsibility for the accident and its consequences.

One could object that such a role is irreconcilable with adversarial procedure. The defendant has the right to defend himself, hasn't he? It is true that a proactive approach goes to the heart of adversarialism. It should go there and kill it. In some of the most innovative and state-of-the-art compensation schemes this already seems to be on the horizon. In present-day practice, many claims resolution processes, or, depending on jurisdiction and compensation scheme, most such processes, including fault-based ones, do not start off in such an unmitigated adversarial way that the insurer or agency has no room to take and keep the initiative. Sensible claims resolution should simply never start off in an adversarial way. No scheme design requires it – not even when eligibility cannot *prima facie* be established, which is generally a minority of cases. There are no relevant facts that cannot be actively investigated by (the agent of) the party addressed. All the requirements, including those intrinsic to fault-based compensation such as fault, causality and damage, can be determined on an objective basis, with no or only a minimal burden of establishing relevant facts remaining on the applicant for compensation. The necessary cooperation of the applicant will normally be given when politely asked for, for instance in providing information that can only come from him. When problems arise, deliberate efforts can be made to mediate solutions and prevent conflict. The party whose actions have caused the injury (the 'defendant') need not worry. He just needs to be insured.

Such an approach may not always succeed. That resort is taken to adversarial procedures, in second instance or sometimes even from quite early on, will probably remain unavoidable in a minority of cases. That will be so, by the way, irrespective of the nature of the scheme – whether fault or no-fault. The default, however, should be that the agents of the responsible party take and keep the initiative. Not the other way around. Such is required by justice. Better outcomes all round.

B. Providing a Broader Scope of Services than Purely Monetary Compensation

There are many reasons why, in any compensation scheme, the agent or insurers should not limit themselves to providing financial relief, but also provide for, or facilitate the provision of, recovery and rehabilitation services. This chapter is not the place to elaborate on the wealth of reasons behind this. Let it suffice to say that even the most traditional tort or common law-based compensation system cherishes the purpose of restoring the victim as much as possible to his original state ('restitutio in integrum') and in case of personal injury this intrinsic restitutionary goal in proper analysis requires a clear priority to recovery and rehabilitation.³⁰ It is a big mistake to leave this entirely up to the victim's own efficacy. No-fault schemes often have a more explicit mission in promoting health, recovery, rehabilitation and return to work.

Actual support in overcoming the consequences of the suffered wrong, and not just the provision of money, will also be in line with the moral expectations of the victim. Apart from the element of 'taboo trade-off' referred to above, truly accepting responsibility for the consequences ('affirmation'), genuine sympathy for the injured party ('affect'), and taking appropriate remedial measures ('action'), all seem to call for some degree of practical engagement with the predicaments of the victim. In the example of the incident in the railway station hall, how much would you feel restored if the person who knocked you over wouldn't do anything more than pull out his cheque book – or give you the contact details of his insurance company? If, for example, you had difficulty moving around due to bruising, wouldn't you expect him to verify whether you can get home by yourself or offer to assist you in one way or another? The expectations victims have in this regard are, of course, highly context dependent. From a fellow citizen at a railway station who has created only a minor incident, one would probably indeed expect no more than assistance in bringing a quick end to an embarrassing situation. But when the transgressor is represented by a professional organisation whose core mission is to address the predicaments of injury victims, and the consequences are much more severe, diverse and long lasting, the moral expectations for actual support will probably be higher, more diverse and long lasting too.

An approach to the provision of recovery and rehabilitation services in line with the moral expectations of victims would, as a matter of course, take the victim's perspective as the guiding principle. Overviewing the wide array of difficulties victims can experience, it seems that a wider variety of services would be required than those for which responsibility is traditionally assumed. Practices differ considerably between different compensation schemes of course, but everywhere several kinds of needs remain unaddressed. This starts with the immediate practical

³⁰ Akkermans, above, n 9.

needs of a household, especially one with children, when one of its members is suddenly put in hospital or in any other constrained state. Why should ‘first aid’ only involve medical treatment? Recovery from serious injury involves not just one’s medical status, but also the practical, emotional, psychological and social. The immediate aftermath of an accident are the golden hours to show solidarity and engagement with the victim. Practical assistance in meeting immediate needs could psychologically make a decisive difference. Further services could involve general support for the injured party in everything he needs to get his life back on track, such as information, advice, guidance and coaching. They may involve support in administrative matters, such as applying for facilities, tax deductions, benefits and surcharges, or in contacts with third parties, such as the employer, landlord, the rehabilitation centre, care providers and contractors. Sometimes it is about solving bottlenecks in everyday life, such as personal care, activities of daily living, household tasks, caregiving tasks and mobility. But more complex services could also be offered, such as the management of a complex medical care process, requesting facilities from the municipality, organising adapted housing, selecting suppliers of aid, putting the financial administration in order – everything up to arranging an adapted holiday. All this, of course, would depend on the circumstances of the case and the needs of the victim and his or her household.

C. Promoting Personal Contact between Those Involved in the Incident

There is one ‘recovery service’ in particular that should be mentioned here, and that is the promotion and facilitation of personal contact between those involved in the event that caused the injury: between the ‘victim’ and the ‘perpetrator’ if you want to put it that way, although often one will find that on the emotional level there are in reality only victims. In view of the basic nature of the emotional needs of persons who have been injured at the fault of another, and the significant therapeutic value of addressing those needs, not just for the victim but for the responsible party too, it could actually be considered quite peculiar that routines have drifted so much away from what seems to be the morally obvious thing to do. Given the difficulties and obstacles that apparently hinder the parties in bringing about personal contact at their own accord,³¹ insurers and compensation agencies could make a deliberate effort to promote and facilitate personal contact, or see to it that some other agency

³¹ One significant obstacle, extensively addressed in literature, is (the perception) that personal contact, and apologising in particular, would lead to the undue admission of liability or the loss of insurance coverage. See P Vines, ‘Apologies and Civil Liability in the UK: A View from Elsewhere’ (2008) 12(2) *Edinburgh Law Review* 200 ([SSRN](#), [ResearchGate](#)); P Vines, ‘The Power of Apology: Mercy, Forgiveness or Corrective Justice in the Civil Liability Arena’ (2007) 1 *Journal of Public Space* 1 ([SSRN](#), [ResearchGate](#)); P Vines, ‘Apologising to Avoid Liability: Cynical Civility or Practical Morality?’ (2005) 27(5) *Sydney Law Review* 483 ([AustLI](#)); AM Zwart-Hink, ‘The Doctor Has Apologised. Will I Now Get Compensation For My Injuries? Myth and Reality in Apologies and Liability’ (2017) 7:3 *Oñati Socio-legal Series* 497 ([SSRN](#))

does.³² The operationalisation of such an undertaking depends, of course, on the circumstances. In the context of medical errors, significant efforts are already being made to coordinate direct contact between patients and doctors as part of ‘open disclosure’ policies and the like.³³ In the context of traffic accidents, such a thing is still much more rare. In serious cases it seems obvious to aim for mediated contact, as for instance is being done in case of traffic offences or accidents resulting in death or serious injury in pilot schemes in Victoria, Australia,³⁴ Belgium, the Netherlands, Hungary and Ireland.³⁵ In addition, efforts may also be made to promote unaccompanied contact in all cases of road accidents, as is being done in a pilot in the Netherlands.³⁶ If the promotion of personal contact between the parties involved in an injury-causing event were to become standard practice in compensation schemes, also in no-fault ones, this would very likely facilitate improved experience of justice and better recovery and health outcomes.

D. Restorative Justice and the Importance of Participation

The initiatives to bring about personal contact in case of traffic accidents mentioned above are inspired by the ideas of restorative justice, and frequently use the label ‘restorative justice conferencing’ for the meetings they seek to promote and organise. In the context of medical errors too, restorative justice has recently been suggested as a valuable theoretical framework to achieve objectives such as open disclosure, patient safety and ‘just culture’.³⁷ The ideas of restorative justice encompass much more than mediation between the parties involved in a

³² It should, of course, always be the choice of victims whether to participate or not.

³³ Australian Commission on Safety and Quality in Health Care, *Australian Open Disclosure Framework* (Sydney, ACSQHC, 2014); TH Gallagher et al, ‘Disclosing Harmful Medical Errors to Patients’ (2007) 356:16 *New England Journal of Medicine* 2713 (MACRMI); Laarman and Akkermans, above, n 7.

³⁴ Centre for Innovative Justice, *It’s Healing to Hear Another Person’s Story and Also to Tell Your Own Story: Report on the CIJ’s Restorative Justice Conferencing Pilot Program* (Melbourne, RMIT University, 2019).

³⁵ I Marit, *Restorative Justice in Road Traffic Offences. A Manual for Professionals and Victim-volunteers* (Kessel-Lo, Moderator vzw, 2018).

³⁶ At the Vrije Universiteit Amsterdam we are currently working on a pilot with banners placed on the webpages of third-party car insurers at which their insured report accidents online, leading to a dedicated website called Contact Helpt (‘Contact Helps’) where they are informed about and encouraged to take up personal contact with the other party involved. It features podcasts of narratives of those involved in traffic accidents, and all kinds of additional information. See contacthelpt.nl.

³⁷ SWA Dekker, *Just Culture: Restoring Trust and Accountability in Your Organization* (Boca Raton, CRC Press, 2017); SWA Dekker and H Breaky, “‘Just Culture’: Improving Safety by Achieving Substantive, Procedural and Restorative Justice” (2016) *Safety Science* 187 (€); BS Laarman, ‘Just culture en herstelrecht in de afwikkeling van medische schade’ (2019) *Tijdschrift voor Vergoeding Personenschade* 65 (YU); J Carroll and D Reisel, ‘Introducing Restorative Practice in Healthcare Settings’ in T Gavrielides (ed), *Routledge International Handbook of Restorative Justice* (Oxford, Routledge, 2018).

transgression. Apart from the key value that ‘because injustice hurts, justice should heal’, restorative justice involves a process conception, described by John Braithwaite as ‘a process in which all the stakeholders affected by an injustice have the opportunity to discuss the consequences of the injustice and what might be done to put them right’.³⁸ Restorative justice is about putting the affected parties as much as possible in control, and Braithwaite emphasises that their empowerment should be prioritised over other values.³⁹ There is a wealth of empirical evidence of the beneficial effects of restorative justice, not only for the victim but also for the responsible person.⁴⁰

Participation and empowerment of the affected parties seem to coincide largely with the element of ‘voice’ that is one of the key constructs of procedural justice, although the ideal of control obviously goes further than offering people the opportunity to tell their side of the story and to express their opinion on decisions to be taken by others. Voice, participation and control are not narrowly defined concepts, but can be seen as adjacent bandwidths on a sliding scale. It is interesting to notice that a development towards a stronger position for clients is taking place in various sectors of society that are relevant to compensation systems, not least in the field of health care. In a recent chapter on optimising the health of people in road injury compensation, Thompson, Elbers and Cameron point out that the concept of health system responsiveness, incorporating patient-centred and patient-oriented models, has moved to the centre of contemporary thought and practice, and that such models:

“require health care providers to become more participatory; traditional doctor-patient or administrator-patient power dynamics are therefore exchanged for a model of partnership, emphasising patient empowerment and information exchange between all players in the system. A more interactive, participatory environment affords injured patients the opportunity, within practical limits, to be involved in decision-making and direct their course of treatment. The patient must be provided with options

³⁸ J Braithwaite, ‘The Fundamentals of Restorative Justice’ in S Dinnen et al (eds), *A Kind of Mending: Restorative Justice in the Pacific Islands* (Canberra, ANU Press, 2003) 35; J Braithwaite, ‘Restorative Justice and Therapeutic Jurisprudence’ (2002) *Criminal Law Bulletin* 244 (Braithwaite, ANU).

³⁹ Braithwaite, *ibid*.

⁴⁰ J Latimer et al, ‘The Effectiveness of Restorative Justice Practices: A Meta-analysis’ (2005) 85:2 *The Prison Journal* 136 (UMD); H Strang et al, ‘Restorative Justice Conferencing (RJC) Using Face-to-face Meetings of Offenders and Victims. Effect on Offender Recidivism and Victim Satisfaction. A Systematic Review’ *Campbell Systematic Reviews* 2013/12 (Oslo, The Campbell Collaboration, 2013). See also Chs 9 and 13 of L Sherman and W Strang, *Restorative Justice: The Evidence* (London, The Smith Institute, 2007) and Chs 8–19 of T Gavrielides (ed), *Routledge International Handbook of Restorative Justice* (Oxford, Routledge, 2018).

to be engaged, consulted, effectively communicated with and informed of their options. In short, the patient has agency.”⁴¹

In view of all the above, it seems very likely that more participation would not only serve people’s health, but also their experience of justice. Compensation systems would be wise to follow suit. This too, need not be a matter of absolutes, but can best be seen as a matter of taking as many steps as possible towards an ideal.

One such step could be to optimise the opportunity for victims to give input to the claim resolution process and to express what is important to them, and to allow for the time it takes them to do so. Accommodating victims’ participation in the claims resolution process seems to be perfectly feasible even in traditional fault-based compensation schemes, although if there is a lawyer involved or some other representative, much will of course depend on his approach and collaboration.⁴² For instance in the Netherlands, where the large majority of injury claims are resolved in sometimes long-drawn-out out of court negotiations, the Code of Conduct for Handling Personal Injury Claims⁴³ recommends the use of a plan of action, drawn up by mutual agreement between the parties at the beginning of the resolution process. This plan of action sets out the steps to be taken in order to achieve a settlement, contains arrangements on who will do what and targets in a regard for deadlines. During the resolution process, the plan of action is reviewed at periodic consultations and adjustments can be made. Such a plan of action not only better enables the victim to give input to the resolution process, it is also a tangible expression of the ‘joint ownership’ of the problem that the damage has to be identified, act upon, limited, assessed, compensated and so on, and for this reason alone serves to allow the victim to experience justice. A plan of action can be made up in various forms but it seems likely that an interactive action plan that is part of an internet application that allows for information, communication, case documents to be viewed and uploaded and so forth, would be the most powerful tool for victim participation.

⁴¹ Thompson et al, above n 29 (references omitted).

⁴² On the responsibilities of lawyers for claimant health and emotional wellbeing, see G Grant and C Parker, ‘Lawyers’ Responsibility for Claimant Health in Injury Compensation Systems’, Chapter 12 of this book; M Keet et al, ‘Anticipating and Managing the Psychological Cost of Civil Litigation’ (2017) 34:2 *Windsor Yearbook of Access to Justice* 73; NA Elbers et al, ‘Exploring Lawyer-Client Interaction: A Qualitative Study of Positive Lawyer Characteristics’ (2012) 5:1 *Psychological Injury and Law* 89.

⁴³ *Gedragscode Behandeling Letselschade* (GBL), English translation available at www.deletselschaderaad.nl/wp-content/uploads/GBL-Engels-2012-def.pdf.

E. Changing the Roles in the Game: Having Assessments Carried out by Neutral Third Parties

There is a more fundamental way in which to address the risk that the injured party might experience his interaction with the insurer or agency as being forced into an unjust and unfair struggle with a more experienced and powerful opponent. This is by separating the two roles that are normally both fulfilled by the insurer or agency, namely, on the one hand, to bear (or to guard) the costs of compensation and services and, on the other hand, to carry out the necessary assessments to establish eligibility and to estimate amounts of compensation. Although it is a widely accepted feature of compensation procedure that these two roles are fulfilled by one and the same party, the fact that his opposite party is acting as a ‘judge in his own case’ does not feel right for the victim from a moral point of view, nor from the point of view of justice. Of course, the insurer’s assessments can be disputed, whether in the context of negotiations or in some form of appeal, and ultimately also before a real judge. But not only is this hampered in reality by various serious obstacles, it also invokes exactly the kind of adversarialism that obstructs the victim’s experience of justice. And, as an aside, it is also very cost-inefficient as it involves several assessments of the same issue.

This fundamental flaw in conventional claims resolution procedure can be addressed by having all key assessments carried out by a neutral third party. This could take the form of a neutral party advising on the case as a whole, as is being done by the Swedish Road Traffic Injuries Commission (RTIC),⁴⁴ the Irish Personal Injuries Assessment Board (PIAB),⁴⁵ and the Belgian Fund for Medical Accidents (FMA).⁴⁶ Or it could involve several separate assessments, such as eligibility for compensation, the estimation of certain heads of loss, eligibility for certain services, medical assessments and all other key decisions. The neutral third party could be a public body, such as the RTIC, PIAB and FMA mentioned above, but this role

⁴⁴ The Swedish RTIC (www.trafikskadenamnden.se) reviews serious traffic injuries in order to ensure that compensation for bodily injury is fair and uniform. The Government designates the Board’s chairman, and the remaining members represent employer and employee organisations and the insurance companies. The Board issues recommendations on claims adjustment in individual cases, private insurance companies pay for the damage.

⁴⁵ The Irish PIAB (www.piab.ie/eng/) is a statutory body set up under the Personal Injuries Assessment Board (PIAB) Act 2003. It provides independent assessment of personal injury compensation for victims of workplace, motor and public liability accidents. See J Ilan, ‘Four Years of the Personal Injuries Assessment Board: Assessing its Impact’ (2009) 1 *Judicial Studies Institute Journal* 54 ([ResearchGate](https://www.researchgate.net/publication/312111111)).

⁴⁶ The Belgian FMA was set up under the Medical Accidents Act 2010 (Wet 31 maart 2010 betreffende de vergoeding van schade als gevolg van gezondheidszorg, [BS 2 april 2010, p 19913](#)). It provides independent assessment of claims for compensation after adverse medical events. See T Vandersteegen et al, (2017) ‘Advantages and Disadvantages of the Belgian Not-only-fault System for Medical Incidents’ (2017) 72:1 *Acta Clinica Belgica* 36 ([€](#)); T Vansweevelt et al, ‘No-fault Law on Medical Accidents in Belgium: An Evaluation after Six Years’ (2019) 10:3 *Journal of European Tort Law* 257 ([€](#)).

could also be fulfilled by for-profit loss adjustment or assessor companies. In the latter case, however, it does seem essential that the instruction should not be given by the insurer or agency alone, but by both parties together, otherwise there would still be an incentive in the system that could lead to the interests of the paying party being given a greater weight in the assessment than the interests of the receiving party. This also applies to independent medical assessments (IMEs).⁴⁷ What is essential is that all decisions that matter are not taken by the victim's counterpart, but by a neutral third party, so that the victim is not put in a position in which he is likely to feel that he has to fight as David against Goliath to get what is rightfully due to him.⁴⁸

If pursued consistently, such an approach could allow for a change of roles, in which the insurer or agency is not so much in opposition to the victim, but rather alongside him, in a joint quest for equitable solutions to a common problem. In this respect, it seems to be the most thorough countermeasure against needless adversarialism, and therefore potentially very promising for achieving justice. Since the results of jointly prepared assessments are likely to be accepted more often than positions taken unilaterally, it may also be a more cost-efficient approach.

F. Promoting Procedural Justice

An obvious way to address the justice needs of personal injury victims is in the promotion of procedural justice in the claims resolution process. Several issues that were addressed above incorporate or coincide with one or more of the elements of procedural justice, which should not come as a surprise. The key constructs that are decisive for the experience of procedural justice are voice, trustworthy motives, dignity and respect, and neutrality in decision making. As mentioned above, participation and empowerment coincide largely with the element of 'voice'. Having assessments carried out by neutral third parties should greatly benefit the element of 'neutrality in decision making'. But also, apart from such more or less demanding undertakings, the promotion of procedural justice should be perfectly feasible. This chapter is not the place to discuss all possible modalities of the promotion of procedural justice in the context of the resolution of personal injury claims. I will confine myself to two issues where it seems both essential and

⁴⁷ B Kilgour et al, 'Procedural Justice and the Use of Independent Medical Evaluations in Workers' Compensation' (2015) 8 *Psychological Injury and Law* 153 (€).

⁴⁸ I do realise that, especially in no-fault systems, it might be that the executive agency itself is already explicitly instructed to act on the basis of objective and neutral criteria. However, it is the victim's perspective and experience, and not the formal mission of the agency, that is decisive here. Even if the agency takes its decisions solely on the basis of neutral and objective criteria, the objection remains that it is the victim's opponent who is taking unilateral positions, and not a neutral third party who is doing justice between the parties.

relatively easy to achieve improvements, namely information and face-to-face contact.

An issue that is often reported by claimants and that should be relatively easy to address is the lack of adequate information.⁴⁹ Adequate information is of course a prerequisite for achieving more ambitious objectives such as participation, empowerment and agency, but will already in itself benefit perceived procedural justice. Information provided on a dedicated website alone has proved to be enough to improve the perceived fairness of the monetary outcome of claims resolution.⁵⁰ Given the fundamental importance of adequate information, it should be considered unacceptable that there are still so many deficiencies reported on this basic point. Insurers or agencies could be much more ambitious in this respect, which by no means implies that claimants' lawyers, when involved, do not bear the greatest responsibility in this matter.⁵¹ But many claimants do not engage a lawyer, and even when they do, information provided by the insurer or agency remains to be of independent importance. Online information, preferably in the form of an internet application allowing for personalised information, communication, the consultation of a plan of action or any other overview of steps to be taken, case documents to be viewed and uploaded and so forth, combined with regular face-to-face communication, seems to have great potential, much more than any written information.

It may seem paradoxical, but it is not: no matter how promising the future may be in terms of web-based information and support for the applicants of compensation, at the same time, personal contact should also be prioritised. These two means of information are actually strongly mutually supportive. Face-to-face communication between the victim and the claims or case manager of the insurer or agency also seems to be very important for the way in which victims view the accident and the other party.⁵² This relates not only to the issue of being perceived as truly taking responsibility, as discussed above – in this case, not by the perpetrator, but by the party representing him – but also to the procedural justice elements of 'voice' and 'dignity and respect'. Claimants often report that they feel treated as though they

⁴⁹ Akkermans, above, n 9; Lippel (2012), above, n 6; Kilgour et al, above, n 5; Elbers et al (2013), above, n 1; NA Elbers et al, 'Factors that Challenge Health for People Involved in the Compensation Process Following a Motor Vehicle Crash: A Longitudinal Study' (2015) *BMC Public Health* 339; GM Grant et al, 'Relationship between Stressfulness of Claiming for Injury Compensation and Long-term Recovery: A Prospective Cohort Study' (2014) 71:4 *JAMA Psychiatry* 446; D Murgatroyd et al, 'The Perceptions and Experiences of People Injured in Motor Vehicle Crashes in a Compensation Scheme Setting: A Qualitative Study' (2015) 15:423 *BMC Public Health* 67.

⁵⁰ NA Elbers et al, 'Effectiveness of a Web-based Intervention for Injured Claimants: A Randomized Controlled Trial' (2013) 14 *Trials* 227.

⁵¹ On the responsibilities of lawyers see the references in n 42 above.

⁵² Elbers et al (2013), above, n 1.

are just a number.⁵³ A respectful and dignified treatment is much more than politeness and smiling. It is most of all about allowing someone the opportunity to express himself and listening carefully, asking what happened, how things are going, and allowing him the time he needs to give an answer (even when this involves issues that – strictly speaking – are not relevant to the steps that are to be taken), asking what he expects from the resolution process (and adjusting unrealistic expectations), and explaining in a careful and comprehensible way one's own position and the reason why certain information is necessary and certain steps have to be taken. Direct consultation, of course, is indispensable to do all of these things. Web-based information can add immensely to the comprehensibility of all this information – but it can never replace personal contact.

It would be a tragic misconception to think that face-to-face contact is only necessary once. If one considers what is known about the experiences of personal injury victims in compensation procedures,⁵⁴ it becomes clear that personal contact should take place with a certain regularity – depending of course on the duration of the process. In particular, when a representative is involved, one should not think that it is his responsibility to inform his client, and that there is no longer a role for personal contact. If there is a representative, he or she should, of course, be able to attend, but for the purposes in question, personal contact with the claim or case manager of the insurer or agency remains indispensable.

VII. In Conclusion

There are many possibilities for countering personal injury victims' experience of injustice by making claims resolution psychologically more responsive and intelligent, regardless of what kind of compensation system is involved, fault-based or no-fault. A system more responsive to the moral expectations of victims will actively acknowledge responsibility for the incurred harm and its redress, take action to promote recovery and participation, and involve sufficient personal contact, not only between the victim and the person responsible for the injury-causing event, but also with claims or case managers. As noted above, it could actually be considered quite peculiar that routines have drifted so much away from what seems to be the morally obvious thing to do. In particular, it seems high time to review the adversarial character of compensation procedures and to consider whether adversarialism is ready for the dust bin. I think it is. In his chapter in this book, Christopher Hodges concludes in pointed terms that 'fault and adversarial

⁵³ Kilgour et al, above, n 5; Elbers et al (2013), above, n 1; Lippel (2012), above, n 6; Akkermans and van Wees, above, n 9.

⁵⁴ See the references in n 49 above.

systems are old technology'.⁵⁵ I am not so sure about faults⁵⁶ – that is, as no more than a payment trigger – but I couldn't agree more about adversarialism. That is simply harmful, while the mission of justice can only be to heal. Under certain conditions, adversarial procedures may be unavoidable and, for the development of the law, sometimes even desirable. But adversarialism just should not be the default condition. Justice requires that we get rid of it. Responding to the moral expectations and justice needs of victims will promote recovery and health outcomes, reduce health care costs and promote return to work. It also seems a reasonable expectation that this will have a positive effect on the overall amount of damages, diminish transaction costs and increase customer satisfaction. The societal costs of personal injury are already more than high enough. Psychologically more responsive and intelligent claims resolution is in the interests of us all. Let us devote our efforts to developing the legal technology of the future.

⁵⁵ C Hodges, 'Achieving a Just Culture that Learns and Improves', Chapter 7 of this book.

⁵⁶ This ultimately has to do with the difference between corrective and distributive justice. Space does not permit me to elaborate on this here.